Supreme Court, U.S.
FILED
00-224 AUG - 9 2000
OFFICE OF THE CLERK

No.

SUPREME COURT OF THE UNITED STATES

JOHN C. MANDANICI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD EMANUEL
COUNSEL OF RECORD
FOR PETITIONER JOHN C. MANDANICI, JR
601 PLYMOUTH COLONY
BRANFORD, CT. 06405
(203) 488-1040

7 DPP

A. Questions Presented For Review

1. Does the reasonable doubt standard have such importance in the criminal law so as to require new cases involving that standard to be given retroactive application in collateral relief cases, and should this Court settle the conflict between the Second Circuit which holds that new cases involving the reasonable doubt standard are not to be applied retroactively in collateral relief cases and five other Circuits which hold that such cases should be applied retroactively?

2. In light of United States v. Gaudin, 515 U.S. 506(1995) and United States v. Ali, 68 F.3d 1468(2nd Cir. 1995) which together hold that materiality is an element of the false statement statute which must be proven beyond a reasonable doubt, and in light of the fact that the trial court in the petitioner's case decided the issue of materiality by using the civil standard of a preponderance of the evidence, should the Gaudin and Ali cases be applied retroactively so as to grant the petitioner collateral relief because they are the types of cases which decide the meaning of a statute and thus the restrictions on retroactivity in Teague v. Lane, 489 U.S. 288(1989) do not apply?

B. List Of All Parties

The caption of the case lists all the parties.

C-1 Table Of Contents

A Questions Presented For Review.....i

B. List Of All Parties.....ii

C-1 Table Of Contents.....iii

C-2 Table Of Cited Authorities.....iv

D. Citation Of Official And Unofficial Reports.....1

E. Statement Of The Basis For Jurisdiction.....1

F. Constitutional And Statutory Provisions.....1

G. Statement Of The Case.....3
1. General Court History.....3
2. Facts Of The Case.....5

H. Argument.....12
1. Retroactive Application Due To Importance Of Reasonable Doubt Standard.....12
2. Retroactive Application Due To Substantive Change In The Law.....23

I. Appendix.....1a

C-2 Table Of Cited Authorities

Cases

Adams v. Aiken, 965 F.2d 1306(4th Cir. 1992), on remand, 41 F. 3d 175(4th Cir. 1994).....15,16,21,25

Adams v. Evatt, 511 U.S. 1001, 114 S. Ct. 1365, 128 L. Ed.2d 42(1994).....16,17,22

Bilzerian v. United States, 127 F.3d 237 (2nd Cir. 1997).....23,24,26,27

Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed.2d 828(1998).....15,26,27

Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed.2d 339(1990).....16,19,20

Chalmers v. Mitchell, 73 F.3d 1262(2nd Cir. 1996).....25

DeVito v. United States, 413 F.2d 1147(U.S. Court of Federal Claims, 1969).....7

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799(1963).....13,17,20,21

Hannon Electric Co. v. United States, 31 Fed. Cl. 135(U.S. Court of Federal Claims, 1994).....7

Humphrey v. Cain, 138 F.3d 552(5th Cir. 1998).....20,21

Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434(1934).....7

Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168(1948).....25

Nevius v. Sumner, 105 F.3d 453(9th Cir. 1996).....20

Nutter v. White, 39 F.3d 1154
(11th Cir. 1994).....18-21,25

O'Dell v. Netherland, 521 U.S. 151, 117 S. Ct.1969,
138 L. Ed. 2d 351(1997).....13,21

Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257,
108 L. Ed.2d 415(1990).....17

Sawyer v. Smith, 497 U.S. 227, 110 S. Ct. 2822,
111 L. Ed.2d 193(1990).....13

Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268,
73 L. Ed. 692(1929).....26

Slack v. McDaniel, 529 U.S. , 120 S. Ct. 1595,
146 L. Ed. 2d 542(2000).....4

Smith v. Edwards, 175 F.3d 99(2nd Cir. 1999).....25

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078,
124 L. Ed.2d 182(1993).....15,16,19,20,21,25

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060,
103 L. Ed.2d 334(1989).....i,12-17,19-24,26,27

Thomas Creek Lumber v. United States, 36 Fed. Cl. 220
(U.S. Court of Federal Claims, 1996).....7

United States v. Ali, 68 F.3d 1468
(2nd Cir. 1995)..... i,3,4,12,21,23,24,26,27

United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310,
132 L. Ed.2d 444 (1995).....i,3,4,12,18,19,21,23,24,26,27

United States v. Mandanici (Mandanici I),
729 F.2d 914(2nd Cir. 1984).....3,6,11

United States v. Mandanici (Mandanici II),
205 F.3d 519(2nd Cir. 2000).....1,4,10-13,17,21,22,24,27

United States v. Montague, 40 F.3d 1251
(D.C. Cir. 1994).....25

United States v. Morgan, 346 U.S. 502, 74 S. Ct. 247,
98 L. Ed. 248(1954).....3,27

United States v. Swindall, 107 F.3d 831
(11th Cir. 1997).....18,19,21

United States v. Winstar, 518 U.S. 839, 116 S. Ct. 2432,
135 L. Ed.2d 964(1996).....7

West v. Vaughn, 204 F.3d 53(3rd Cir. 2000).....20,21

In Re Winship, 397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed.2d 368(1970).....13-15,22

Constitutional Provisions

Fifth Amendment.....1
Sixth Amendment.....1

Statutes

Federal
AEDPA(Antiterrorism and Effective Death Penalty Act of
1996)(PL 104-132).....4,5,20
18 U.S.C., Sec. 1001.....2,3,10
18 U.S.C., Sec. 1014.....3
28 U.S.C., Sec. 1254.....1

28 U.S.C., Sec. 1651.....1-3
28 U.S.C., Sec. 1865(b)(5).....4
USSG, Sec. 4A1.2.....4
USSG, Sec. 4A1.3.....4

Connecticut
Conn. Gen. Stat., Sec. 29-28(b)(2).....4
Conn. Gen. Stat., Sec. 29-29.....4
Conn. Gen. Stat., Sec. 29-35(a).....4
Conn. Gen. Stat., Sec. 29-37(b).....4
Conn. Gen. Stat., Sec. 29-153.....4
Conn. Gen. Stat., Sec. 29-154a(4).....4
Conn. Gen. Stat., Sec. 53-206.....4
Conn. Gen. Stat., Sec. 53a-217c.....4

Miscellaneous

17A C.J.S., Contracts, Sec. 414.....7
17B C.J.S., Contracts, Sec. 557.....7
17B C.J.S., Contracts, Sec. 558.....7
17B C.J.S., Contracts, Sec. 559.....7

D. Citation Of Official And Unofficial Reports

The citation of the opinion entered in the case is United States v. Mandanici, 205 F.3d 519(2nd Cir. 2000). That decision is also contained in the Appendix. The earlier opinion of the District Court has no official citation but is contained in the Appendix.

E. Statement Of The Basis For Jurisdiction

i. On February 23, 2000, the United States Court Of Appeals For The Second Circuit filed its decision which is the subject of this petition.

ii. On May 12, 2000, the United States Court of Appeals For The Second Circuit denied the Petition For Rehearing With Suggestion For Rehearing En Banc timely filed by the petitioner.

iii. The statute which confers on this Court the jurisdiction to review on a writ of certiorari the above judgment is 28 U.S.C., Sec. 1254, and the statute which provided jurisdiction in the District Court is the All Writs Statute, 28 U.S.C., Sec. 1651.

F. Constitutional And Statutory Provisions

The constitutional provisions are the Fifth and Sixth Amendments which state in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law". Fifth Amendment.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." Sixth Amendment.

The All Writs Statute, 28 U.S.C., Sec. 1651, states that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law...."

The penal statute, 18 U.S.C., Sec. 1001, in effect at the time of the petitioner's trial in 1983 stated:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

G. Statement Of The Case

1. General Court History

The petitioner was convicted in 1983 of three counts of violating 18 U.S.C., Sec. 1001 but was found not guilty of the fourth count of violating 18 U.S.C., Sec. 1014. The court on June 17, 1983, imposed concurrent suspended sentences of five years imprisonment for Counts Two and Three and imposed fines for said counts totaling $20,000.00. The Court of Appeals For The Second Circuit reversed the jury's guilty conviction on Count One due to insufficient evidence and that no "rational juror" would have found the petitioner guilty. United States v. Mandanici (Mandanici I), 729 F. 2d 914, 920(2nd Cir. 1984). The Court affirmed the remaining convictions on Counts Two and Three which are the subject of this petition.

In 1995, this Court in United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed.2d 444(1995) held that the jury rather than the judge is required to decide the element of materiality in a prosecution under the false statement statute, 18 U.S.C., Sec. 1001. Soon thereafter, the Second Circuit in United States v. Ali, 68 F.3d 1468, 1474-1475(2nd Cir. 1995) held that materiality is an element of all components of the false statement statute.

After the Gaudin decision was released, the petitioner a few months later in 1995 filed a petition in the District Court seeking collateral relief and requesting the court to issue a writ of coram nobis pursuant to the All Writs Statute, 28 U.S.C., Sec. 1651.[1] The petitioner claimed that his constitutional

---

[1] Even if a citizen is no longer in custody, a court can grant a writ of coram nobis pursuant to the All Writs Statute, 28 U.S.C., Sec. 1651, and vacate his or her convictions if there are "circumstances compelling such action to achieve justice" and to correct errors of the "most fundamental character". United States v. Morgan, 346 U.S. 502, 506-507, 511-512, 74 S. Ct. 247, 98 L. Ed. 248(1954). "Although the term has been served, the results of the conviction may persist. Subsequent convictions

rights to due process and to a jury trial were violated because the materiality of his statements had not been decided by a jury using the reasonable doubt standard. In said petition and briefs the petitioner sought the retroactive application of Gaudin and Ali and stressed that the trial court had decided materiality by the use of the civil standard of a preponderance of the evidence which was unconstitutional. The District Court denied the petition. Appendix (App.), 26a-31a.

The Second Circuit in United States v. Mandanici (Mandanici II), 205 F.3d 519(2nd Cir. 2000), App. 2a, affirmed that denial. Although the court found that the trial judge rather than the jury had decided the element of materiality at the petitioner's trial and had used the civil standard of a preponderance of the evidence rather than the constitutionally required reasonable doubt standard, the court denied relief because it concluded that the Gaudin and Ali cases could not be applied retroactively in the petitioner's collateral relief case because the reasonable doubt standard does not have a "primacy and centrality" in the criminal justice system. Mandanici II at 526, 531, App. 13a, 22a-23a. However, the court conceded that the "question is a close one" and the case involved "complex constitutional questions." Mandanici II at 528, 527, n.15, App. 17a, 16a, n.15. This present petition concerns that decision of the Second Circuit in Mandanici II.[2]

---

may carry heavier penalties, civil rights may be affected." Id., 512-513. The legal consequences that the petitioner suffers from his said felony convictions, which are his only convictions, are that Connecticut law prohibits him from bearing arms and from obtaining certain licenses, Conn. Gen. Stat., Sec. 29-35(a), 28 (b)(2), 29, 37(b), Sec. 53a-217c, Sec. 53-206, Sec. 29-153, 154a(4); and federal law prevents him from sitting as a juror and exposes him to greater sentences upon any subsequent conviction. 28 U.S.C., Sec. 1865(b)(5), USSG, Secs., 4A1.3; 4A1.2.

[2] Since the petition was filed in the District Court in 1995 prior to the enactment of AEDPA in 1996, then even assuming that any restriction that applies to habeas corpus petitions also applies to coram nobis petitions, such restrictions imposed by AEDPA do not apply because the petition was filed in the District Court prior to the enactment of AEDPA in 1996. Mandanici II, supra, 205 F.3d at 524, n.9, App. 8a, n.9. See Slack v. McDaniel, 529 U.S. , 120 S. Ct. 1595, 1602, 146 L. Ed. 2d 542(2000)("a

2. Facts Of The Case

Not only did the Second Circuit find that the civil standard of proof was used but the trial court in 1983 noted that the case was basically a civil case involving statements by the petitioner contained in a housing contract he signed with the government. The court stated that the facts of the case "don't call for criminal remedies. This is a civil contract. I mean it's a contract with civil ramifications." Record submitted to the Second Circuit (Record), #27, p. 1165. The trial court sua sponte almost dismissed the case. Id., 1165-1169.

At sentencing, the court stated that the petitioner had not committed "fraud" and the court clearly implied that the government was not out "ten cents", was not "gyp[ped]", and that the petitioner pursuant to his contract with the government provided the government with "Cadillac" style housing for the price of a "Ford" during the time of a housing shortage. Record, #30, p. 46, Record, #29, pp. 24-26. The court stated that there was a "dire need of housing in Bridgeport", and that a local official responsible for monitoring the contract had testified that "the situation was so desperate in Bridgeport that they went to Mr. Mandanici and said **'Please take these people'**, and I had a State official come in and said that was a violation of law to **put people into housing without a contract, but the situation was so desperate that they kind of overlooked it**." Record, #29, pp. 8, 26(emphasis added).

The petitioner's allegedly false statements were contained in government contracts and concerned the amount of rehabilitation work that he had completed on an apartment building to qualify for a subsidized housing program sponsored by the Department of Housing and Urban Development (HUD). The Indictment charged in Count Two

---

court of appeals [is required] to apply pre-AEDPA law in reviewing the trial court's ruling, for cases commenced there [in a district court] pre-AEDPA").

that the petitioner in a preliminary Agreement To Enter Into Housing Assistance Payment Contract (AHAP) stated that "he **would perform** a total of $88,000 in rehabilitation work" when he "then well knew, the rehabilitation work that he **performed** on said property would not cost $88,000." (emphasis added). See Indictment in Appendix to the Second Circuit, pp. 14a-15a. The Indictment in Count Three charged that in the final Housing Assistance Payment Contract (HAP), the petitioner stated that the apartment building "**had been rehabilitated** in accordance with the terms and conditions of [the AHAP]... whereas, in truth and fact [the petitioner] then well knew, the **work had not been performed** in accordance with the terms of the [AHAP]." Id., 15a-16a (emphasis added).

However, the petitioner's actual statement in the later HAP contract which was the basis of Count Three was that the work had been completed "or will be completed". See Government Trial Exhibit #4, HAP Contract, Sec.1.3 (b). See also Mandanici I, supra, 729 F.2d at 916, 921(the actual statement by the petitioner in the HAP contract which was the basis of the Third Count was that the work was completed "or will be completed). It should be noted that a government witness actually testified that after the last contract (the HAP contract) was signed on July 1, 1981, the petitioner spent $6,000.00 more on work that he had agreed to do. Record, #22, pp. 233, 237. The petitioner testified that because the government moved in the tenants before the work was completed, he had difficulty completing the work. Record, # 26, pp. 975-978.

More importantly, even if the petitioner had stated, as contended by the respondent, that all the work had been completed, such statements concerning work completion were immaterial because the government knew that the work had not been completed and waived work completion due to the housing shortage and the actual quality of the petitioner's

housing.[3] Local HUD officials responsible for monitoring and signing the contract with the petitioner testified that they knew that the petitioner had not completed all the rehabilitation work and the petitioner had actually told one of them that he had not completed the work. Record, #22, pp. 181-182, 304, 305, Record, #23, pp. 335-336, 339, 342, 345-347, 370.

It was apparent from the trial court's own observation that the local HUD officials who signed the contract

---

[3] If a party waives a matter in a contract, then that matter is considered not to be material. "A party to a contract may waive provisions for his or her benefit. Likewise there may be a waiver of conditions precedent". 17B C.J.S., Contracts, Sec. 557. "A **waiver** may be express or it may be **inferred from actions, conduct, or a course of dealing**.... The parties may **waive** their right to demand compliance with a provision of such a contract where, on consent of both of them, they establish a **practice which is inconsistent** with such provisions." Id., Secs. 558, 559(emphasis added). A waiver or modification can be oral even if the written contract states that any changes must be in writing. Id., Sec. 414.

The law clearly allows government officials to waive provisions of contracts. " '[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' Lynch v. United States, 292 U.S. [571, 579, 54 S. Ct. 840, 78 L. Ed. 1434(1934)]". United States v. Winstar, 518 U.S. 839, 895, 116 S. Ct. 2432, 135 L. Ed.2d 964(1996)(Per Souter, J., with three Justices concurring and three Justices concurring in the judgment). Concerning a government contract, "a contracting officer has authority to modify a contract if he or she believes such modification is in the **best interest of the government** for a variety of reasons". Thomas Creek Lumber v. United States, 36 Fed. Cl. 220, 243(U.S. Court of Federal Claims, 1996)(emphasis added).

A "constructive **waiver** ... occurs not where the contract is ambiguous, but, rather where the government 'has administered an initially unambiguous contract in such a way as to give a reasonably intelligent and alert opposite party the impression that a contract requirement has been suspended or waived.' " Hannon Electric Co. v. United States, 31 Fed. Cl. 135, 147(U.S. Court of Federal Claims, 1994)(emphasis added). The elements of an election to waive a default in a contract are "(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." DeVito v. United States, 413 F.2d 1147, 1154(U.S. Court of Federal Claims, 1969).

containing the petitioner's statement about work completion knew the rents that they were paying under the contract were very fair even if all the rehabilitation work which the petitioner allegedly falsely stated had been completed had not been completed. The court observed that the actual amount of rehabilitation under the contract to be performed was $77,000.00 not $88,000.00 and that the petitioner had completed roughly $55,000.00 of the promised $77,000.00 in rehabilitation work. Record, #29, p. 5. More importantly the court agreed that the units the petitioner provided under the contract were very good, decent and comfortable at a time when there was a dire need of housing, and the court further noted that one local HUD official had informed the court that "prices for housing in the City of Bridgeport have increased considerably. It is almost impossible to find a unit with modern facilities and constructed within the past ten years for the amount we pay" for the petitioner's units. Record, #29, pp. 5, 8, Record, #30, pp. 47, 43-44. The petitioner had testified to the uncontested fact that he had spent $600,000.00 of his own money rehabilitating the building within two years prior to the time of the government contracts. Record, #25, pp. 732-733, Record, #27, p. 1149. The rehabilitation under the contract was paid for with the petitioner's money and not with any government money or government loans.

It was not unusual for the government to waive the parts of the contract involving work completion. Concerning the program involved in the petitioner's case, a national audit conducted by HUD revealed that "waivers became commonplace." See petitioner's Supplemental Appendix to the Second Circuit, p. 5a, Audit of Section 8 Moderate Rehabilitation Program, Office of Inspector General, HUD, John J. Connors, Assistant Inspector General, Audit Case Number 89-TS-103-0005, April 26, 1989, p. 16. [4]

---

[4] That 1989 HUD audit of the Moderate Rehabilitation Program, which was the program involving the petitioner's contract, stated that there were "inconsistencies" in the program and "most program managers and program participants became confused over their roles and

Such waivers were in accord with the trial court's observations during the trial that the government contracts in the petitioner's case "were very flexible....[,] extremely flexible" and called for a "working relationship between owners of buildings" and HUD. Record, #27, pp. 1164, 1166.

Even after the petitioner's trial and convictions, the government did not feel cheated and actually refused the petitioner's offer to rescind the contracts because there was no other available housing. In a letter dated November 21, 1983 from the petitioner's attorney to HUD officials, the petitioner offered to rescind and void the contract and offered the government 6 more months to provide other housing for the Section 8 tenants. See Appendix to the Second Circuit, pp. 112a-113a. Although HUD never formally responded to that offer, an internal HUD Memorandum by John P. Kennedy, Associate General Counsel, distributed a few weeks later on

---

responsibilities." Audit, p. 14, Supplemental Appendix to the Second Circuit, p. 3a. The auditors stated that

> "current practices by program managers and program participants resulted in wholesale noncompliance with MRP[Moderate Rehabilitation Program] regulations or other written guidance. Rule changes were made to keep pace with the programmatic changes dictated by management. **The need for regulatory waivers became commonplace.** The only revisions made to the 1979 regulations occurred in 1982. These changes were based on the experiences of the PHA's [local public housing agencies] administering the MRP and resulted in simpler, less detailed requirements and more flexibility for PHA's. The general thrust of the revised regulations was to bring the requirements closer in line with those governing the Section 8 Existing Program[where no rehabilitation was required]. Handbooks and other written guidance were similarly not revised to provide clear instructions to HUD program managers and PHA staffs as actual program operations shifted. A key element in any system of internal controls is the establishment of clear policies and related guidelines and instructions for carrying out the policies. Currently, the MRP is lacking that element. HUD needs to decide whether the MRP should be used as originally designed or should be used as it is currently practiced." Audit, p. 16, Supplemental Appendix, p. 5a (emphasis added).

December 1, 1983, actually reveals that HUD feared that the petitioner would seek to void the contract and said Memorandum contains the legal advise that HUD officials "should take no action that would enable Mr. Mandanici to argue that the [HUD] contract had been breached by HUD and that he could, accordingly, evict the remaining Section 8 tenants". Id., 114a.

The reasons for HUD's actions are contained in an earlier internal HUD Memorandum by Philip Abrams, the Assistant Secretary of HUD in Washington, dated October 13, 1983, which refers to the initial desire to terminate the petitioner's contract due to his conviction but then states that the petitioner's contract should not be terminated since

> "it does not appear that any consideration has been given as to whether other housing resources are easily and readily available in other locations within Bridgeport .... Considering the above circumstances, I do not believe that cancellation of the [petitioner's] contract at this time is in the **best interest of the government** and you [lower HUD officials] are hereby directed to take no such action without the approval of this office." (emphasis added). Id., 101a.

Thus the statements about work completion were not material because the government knew that all the work had not been completed and waived the provisions of the contract concerning work completion due to the housing shortage and the fact that the government was getting Cadillac quality housing for the price of a Ford.[5]

---

[5] Although the Second Circuit's opinion did not rest on the underlying facts of the case, it should be noted that the court erred when it stated that the petitioner "was required, *inter alia*, to complete and file a number of documents.... In 1982, [he] was indicted ... on three counts of making false statements in those documents, in violation of 18 U.S.C., Sec. 1001". Mandanici II at 521, App. 4a. As mentioned above the Indictment did not charge the petitioner with making false statements in the documents he supplied but for statements contained in form government

contracts drafted by the government and signed by the petitioner. See Count Two and Count Three in the Indictment, Appendix to the Second Circuit, 14a-16a; Govt. trial exhibits #3, 3A (AHAP contract); and Govt. trial exhibit #4(HAP contract).

Also, in the concurring opinion of Kearse, J., Mandanici II at 532, App. 24a-25a, the court quoted findings by the Second Circuit on the petitioner's direct appeal but did not mention that in the earlier direct appeal the court viewed the evidence "in the light most favorable to the government". See Mandanici I, 729 F. 2d at 919. The concurring opinion refused to mention facts contained in the record favorable to the petitioner and cited by him in his Brief, pp. 7-9, 21, and Reply Brief, pp.5-8, submitted to the Second Circuit concerning his current appeal. The concurring opinion did not refer to any of the facts mentioned above concerning the petitioner's statements to the officials that the work was not completed and their knowledge of that fact, nor did the opinion mention the housing shortage and why the housing officials would waive the provisions concerning work completion, nor did the opinion mention the government's rejection of the petitioner's request after his trial to cancel the contracts. Also, the petitioner stressed in his briefs to the Second Circuit that the court should not rely on the summary of the facts contained in its decision concerning the petitioner's direct appeal because that appeal concerned the sufficiency of the evidence regarding falsity and not materiality, and the court viewed the evidence in the light most favorable to the government and missed many things favorable to the petitioner on the issue of materiality.

For example, the Second Circuit in the earlier appeal never referred to the above mentioned facts that the officials to whom the petitioner made the allegedly false statements and who either were in charge of the petitioner's project or who signed the contract testified that they knew the work was not all done when the contract was signed and one testified that the petitioner told him the work was not all done. Also, the Second Circuit in the direct appeal referred to an Undated Letter which stated that the work was completed, but the court did not mention the fact that the official who received that letter testified that the petitioner kept the original and only gave him a copy of the undated letter. Record, #23, p. 340. If the Second Circuit had mentioned that the petitioner had kept the original, then that would have weakened the government's case that the petitioner had told the official to whom he gave the letter that the attachments were paid receipts for work done. Keeping the original strengthened the petitioner's testimony that the undated letter was merely a

H. Argument

1. The reasonable doubt standard is of sufficient importance in the criminal justice system as to warrant retroactive application of new cases which identify situations where that constitutionally required standard was not used.

The Second Circuit found as a fact that the jury did not decide the issue of the materiality of the statements but rather the trial court made that determination using the civil standard of proof by a preponderance of the evidence. Mandanici II at 526, 531, App. 13a, 22a-23a. However, although the court stated that the use of such a standard violated the petitioner's constitutional right of due process, the court held that the Gaudin and Ali cases could not be applied retroactively in the present collateral relief case because such new cases involving the reasonable doubt standard did not meet the requirements of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.2d 334(1989). Mandanici II at 528-531, App. 17a-24a.

---

draft and the attachments were estimates of the work he would perform. Nor did the Second Circuit in the earlier appeal refer to the above mentioned facts that one government witness testified that after the last contract (the HAP contract) was signed on July 1, 1981, the petitioner spent $6,000.00 more on work that he had agreed to do, and that he had spent $600,000.00 rehabilitating the building within two years prior to the contract. The petitioner in his Reply Brief, pp. 5-7, submitted to the Second Circuit concerning the current appeal provided other facts favorable to him which contradicted the conclusions drawn by the court in the earlier direct appeal, including the conclusion that the petitioner had submitted invoices that falsely stated that the work had been completed. Although all of the above matters were mentioned in the petitioner's Brief and Reply Brief submitted as part of his current appeal to the Second Circuit, the concurring opinion failed to mention these facts favorable to the petitioner and found in the record.

In Teague, this Court held that there were only two exceptions where new rules of criminal procedure could be applied retroactively in collateral relief cases. The first exception involves "new rules that place an entire category of primary conduct beyond the reach of the criminal law". Sawyer v. Smith, 497 U.S. 227, 241, 110 S. Ct. 2822, 111 L. Ed.2d 193(1990). The second exception concerns new "watershed rules of criminal procedure implicating the fundamental **fairness** and **accuracy** of the criminal proceeding." O'Dell v. Netherland, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed.2d 351(1997)(emphasis added). That watershed rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Sawyer, supra, 497 U.S. at 242.

The Second Circuit held that the first exception of Teague was not involved but that the "question is a close one" regarding the second exception of Teague concerning new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Mandanici II at 528, App. 17a. The court held that the constitutionally mandated reasonable doubt standard did not meet the second exception of Teague because that constitutional requirement did not have the "primacy and centrality" of other rules such as the right to counsel under Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799(1963). Mandanici II at 529, 531, App. 18a, 22a.

However, the second exception does apply because the reasonable doubt standard, as described by this Court in the case of In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 368(1970), is the primary tool in the criminal justice system for promoting fairness and accuracy. In Winship, supra at 360, 364, this Court condemned the use of the "preponderance of evidence" standard in criminal trials as a violation of a defendant's constitutional right to due process. The Court explained that the reasonable doubt standard is

"a **prime instrument for reducing the risk of convictions resting on factual error**. The standard provides concrete substance for the presumption of innocence - that **bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.**" Supra at 363(emphasis added).

The Court also rejected the

"suggestion that there is ... only **a 'tenuous difference' between the reasonable doubt and preponderance standards**. The suggestion is singularly **unpersuasive**.... [As commentators have observed] 'the preponderance test is susceptible to the **misinterpretation** that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the **greater quantum**, without regard to its effect in convincing his mind of the truth of the proposition asserted.'(citation omitted)."Supra, at 367-368(emphasis added).

Since Winship stresses the need of the reasonable doubt standard to reduce the risks of faulty convictions, then surely cases concerning that standard satisfy Teague's second exception since this Court as recently as 1998 held that the

"Teague doctrine is founded on the notion that one of the 'principal functions of habeas corpus is to assure that no man has been incarcerated under a procedure which creates an impermissibly **large risk** that the innocent will be convicted.' (citation omitted).

> Consequently, ... [if] a new rule of criminal procedure is of such a nature that 'without it the likelihood of an **accurate conviction is seriously diminished**' .... [then the courts should] apply the rule **retroactively** on habeas review." Bousley v. United States, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed.2d 828 (1998)(emphasis added).

Assuming that the preponderance of the evidence means 51% of the evidence, then surely a conviction in which there is a 49% chance that the defendant was innocent is the type of "large risk" scenario that this Court stated satisfied Teague's rules regarding retroactivity.

Since there is no real difference between when a factfinder uses the lesser preponderance of evidence standard and when a factfinder, to wit a jury, uses a lesser standard than the reasonable doubt standard due to faulty jury instructions, then it is appropriate to consider cases which have addressed the later scenario and the issue of retroactivity. The Fourth Circuit in Adams v. Aiken, 41 F.3d 175(4th Cir., 1994), addressed the issue of whether the case of Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed.2d 182(1993), which held that a constitutionally defective reasonable doubt instruction can not be considered harmless, should be applied retroactively in a collateral relief case. The Fourth Circuit held that

> "in light of Sullivan[, supra], a constitutionally deficient reasonable doubt instruction not only dilutes the standard of proof beyond a reasonable doubt mandated by In Re Winship,(supra), but it also **prevents a jury verdict of guilty from coming into existence**. This failure is a breach of the right to a trial by jury, resulting in a **lack of accuracy and the denial of a bedrock procedural element**

> **essential to fairness**.... Consequently, the rule that a constitutionally deficient **reasonable doubt instruction** violates the Due Process Clause **satisfies Teague's second exception. It should be applied retroactively."** Adams v. Aiken, supra, 41 F.3d at 178-179 (emphasis added).

The decision in Adams was a result of the action of this Court which had earlier granted the defendant's petition for writ of certiorari and ordered "the judgment vacated and [the] case remanded [to the United States Court of Appeals for the Fourth Circuit] for further consideration in light of Sullivan v. Louisiana, [supra]" Adams v. Evatt, 511 U.S. 1001, 114 S. Ct. 1365, 128 L. Ed.2d 42(1994). See Adams v. Aiken, supra, 41 F.3d at 176. Prior to this Court's action, the Fourth Circuit had stated in its earlier opinion that a new case identifying situations where the reasonable doubt standard was not followed due to faulty jury instructions, Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed.2d 339(1990), could not be applied retroactively to collateral relief cases. Adams v. Aiken, 965 F.2d 1306, 1312(4th Cir., 1992). The court held such cases concerning the reasonable doubt standard do not meet the second exception of Teague regarding new rules affecting the accuracy of convictions. Id. Similar to the finding of the Second Circuit in the present case, the court stated that the new case "improves the accuracy of a trial" but it does not "alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.... These elements remained the same. The burden of proof has not changed." Id. [6] As noted above, this Court vacated that

---

[6] The argument in the present case for retroactive application of the new cases is even stronger than in the Adams case because the present situation does involve a change in the standard of proof from a civil standard to the constitutionally mandated reasonable doubt standard. See infra, 23-27.

judgment and remanded the case for further consideration and the Fourth Circuit then ruled that such cases are to be applied retroactively to collateral relief cases.

Since the Second Circuit in the present case stated that the "question is a close one" regarding whether the second exception of Teague applies, then the court should have given greater consideration to this Court's actions in Adams v. Evatt where the Court vacated a judgment similar to the Second Circuit's ruling in the present case resulting in a new decision by the Fourth Circuit which conflicts with the Second Circuit's ruling.

Furthermore, the Second Circuit relied on Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed.2d 415(1990) for the proposition that a new rule must have a "primacy and centrality" to the criminal justice system to be retroactive. Mandanici II at 529, 531, App., 18a, 22a. However, it is important to note that this Court's action vacating the judgment in Adams came later in 1994 and thus the Court was aware of its wording in Saffle when it vacated the judgment in the Adams case. Also, the Saffle case concerned a new rule involving sentencing rather than a rule that affected guilt or innocence, and it appears that the phrase "primacy and centrality" was meant to be more of a description of the new rule in Gideon rather than as a formal precedent that limits retroactive application to only those cases that fit that description. This Court in Saffle stated that the Gideon case was an "illustrat[ion of] the type of rule coming within the [second Teague] exception." Saffle at 495. Adopting the wording "primacy and centrality" as a mandatory condition would appear to conflict with the Court's other observation in Saffle that "the precise contours of this [second Teague] exception may be difficult to discern". Id.

The Second Circuit in its ruling did not mention the above action of this Court in Adams v. Evatt, supra, or the Fourth Circuit's subsequent opinion although they were stressed by the petitioner in his briefs to the Second Circuit. Nor did the Second Circuit address the cases from the Third,

Fifth, Ninth, and Eleventh Circuits that have held that new cases identifying situations where the reasonable doubt standard was not used are to be applied retroactively in collateral relief cases, all of which were brought to the court's attention in the petitioner's briefs or supplemental citation letters. In his briefs to the Second Circuit, the petitioner cited the Eleventh Circuit case of United States v. Swindall, 107 F.3d 831(11th Cir., 1997), in which the court actually sua sponte addressed the issue of whether Gaudin should be retroactively applied in coram nobis cases where the trial judge had used a lower standard of proof than proof beyond a reasonable doubt. The court in Swindall, supra at 836, held that in most Gaudin type situations where the only issue concerns who decided materiality, then Gaudin is not retroactive. But the court noted that in the case before it the appellant was not asserting the claim that

> "the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material, **which would implicate the accuracy of the materiality finding. See Gaudin, [supra, 515 U.S. at 510] n. 1 ... noting that some courts which regard materiality as a legal question for the judge do not require beyond a reasonable doubt burden of proof"**. Swindall, supra at 836(emphasis added).

The court further stated that

> "the Cage rule [prohibiting watered down reasonable doubt instructions] **implicated the accuracy** of a conviction because the 'beyond a reasonable doubt' standard guards against **conviction of the innocent**. Nutter[v. White, 39 F.3d 1154, 1157(11th Circuit, 1994)]. When a jury convicts under an **incorrect reasonable**

> **doubt instruction, it may mistakenly convict an innocent defendant. By contrast**, 'the harm to be corrected by Gaudin [in most Circuits] was not the **inaccuracy** of the decision; rather, the problem to be corrected was that the **wrong entity** was making the decision'.... The fact that the Gaudin rule [usually] does not improve the **accuracy** of the trial is sufficient to render Teague's second exception inapplicable". Swindall, supra at 836(emphasis added).

Thus the Court in Swindall clearly implied that Gaudin is retroactive in the Circuits where the standard used by the trial judge was lower than proof beyond a reasonable doubt because in that situation the problem was not just who decided materiality but that the lower standard of proof which was used "implicated the accuracy of a conviction".

In Nutter v. White, supra at 1157-1158, the court specifically held that the Cage case met the second exception under Teague concerning new rules that "relate to the **accuracy of the conviction** ... and ... alter our understanding of the bedrock procedural elements essential to the fundamental fairness of a proceeding." (emphasis added). The Court in Nutter, supra, stated that

> "[t]he Cage rule meets the **accuracy prong [of Teague]. The reasonable doubt standard guards against the conviction of the innocent by ensuring the systemic accuracy of the criminal system.** Sullivan [v. Louisiana, supra, 508 U.S. at 281] ... [holds that a] jury verdict of guilt beyond a reasonable doubt is a 'basic protection' whose precise effects are unmeasurable'....

> Cage also satisfies the fundamental fairness prong of Teague's second exception. The Supreme Court typically offers the right to counsel, as announced in Gideon v. Wainwright, [supra, 372 U.S. 335], as the paradigm of a 'bedrock procedural element' falling within the second exception... **Like Gideon**, Cage implicates a fundamental guarantee of trial procedure because **use of a lower standard of proof frustrates the jury trial guarantee... Unlike other new rules, an inadequate reasonable doubt instruction can not be cured by other circumstances at trial. Thus, an improper reasonable doubt instruction undermines the fundamental fairness of every trial in which it is used.... Sullivan tells us that 'no judicial determination' is precisely the consequence of Cage error."** Nutter, supra, 39 F.3d at 1157-1158(emphasis added).

The Ninth Circuit in Nevius v. Sumner, 105 F.3d 453, 462(9th Cir., 1996), and the Fifth Circuit in Humphrey v. Cain, 138 F.3d 552(5th Cir., 1998)(adopting the opinion of the panel below at 120 F.3d 526, 529) similarly held that cases such as the Sullivan and Cage cases which identify unconstitutional reasonable doubt instructions should be applied retroactively in collateral relief cases because they meet the second exception of Teague.

In West v. Vaughn, 204 F.3d 53(3rd Cir. 2000), the Third Circuit held that even under the greater restrictions concerning retroactivity imposed by AEDPA, new cases such as the Cage and Sullivan cases should be applied retroactively in collateral relief cases. "Our reasoning is bolstered by the fact that Sullivan's clarity obviated the need for the Supreme Court to make a future, more explicit, pronouncement on whether Cage should be applied retroactively. In practical

terms, Sullivan choked off the flow of cases in which an explicit pronouncement might be necessary." Id., 62.

The Second Circuit in its decision, Mandanici II at 527, n.15, 530, App. 15a, n.15, 20a, did refer to the Swindall and Nutter cases from the Eleventh Circuit but did not mention the Adams case from the Fourth Circuit, the Humphrey case from the Fifth Circuit, nor the Nevius case from the Ninth Circuit. The Third Circuit's decision in West v. Vaughn, supra, was brought to the court's attention by means of a supplemental citation letter that was submitted while the petitioner's Petition For Rehearing was pending and before that petition was denied.

Furthermore, the Second Circuit stated that under the principles set forth in O'Dell v. Netherland, supra, 521 U.S. at 167, one of the Teague conditions is that for a new case to be retroactive it must not concern a " 'narrow right' that applies only to a 'limited class' of cases." Mandanici II at 528, 531, App. 18a, 22a. The court stated that the new cases requiring materiality to be proven beyond a reasonable doubt only affected a subset of cases in a few circuits and thus did not qualify for retroactive application. Mandanici II at 531, App. 22a. But this Court in O'Dell just noted that the right it was considering only affected a limited class of cases and this could "hardly alter out understanding of the bedrock procedural elements essential to the fairness of a proceeding." Id., 167. Thus if a right applies to only a limited number of cases but that right concerns a bedrock principle then the new case can be applied retroactively. The reasonable doubt standard is such a bedrock right. Also, the number of cases involving the false statement statute in the Second Circuit prior to Gaudin and Ali are numerous.

Also, as mentioned earlier, the Second Circuit's decision is primarily based on the premise that the reasonable doubt standard lacks the "primacy and centrality" of other rules such as the rule allowing for counsel as set forth in Gideon. Mandanici II at 531, App. 22a. The court contended that new cases involving the right to counsel are the type to be

applied retroactively because that is a more important right for promoting the "accuracy of the criminal proceeding" and qualifies under the second exception of Teague. Mandanici II at 528-529, App. 18a. But the duty of criminal lawyers is to do everything within the ethical rules to get their client acquitted even if guilty. Thus such a right does not promote the "accuracy of the criminal proceeding" but the reasonable doubt standard as described by this Court in Winship does promote accuracy.

In reality, the reasonable doubt standard is far more important than the right to counsel as evidenced by the fact that defendants occasionally waive the right to counsel and go pro se, just as they waive the right to a jury trial and have a court trial, but no defendant has ever waived the right to the reasonable doubt standard. In fact the primacy of that principle in our criminal justice system is so evident that no court would ever allow a defendant to waive such a right.

Thus the Second Circuit erred in ruling that the reasonable doubt standard lacks sufficient status in this country's criminal justice system to warrant retroactive application of new cases which reveal situations where that standard was not used. That decision disregarded the action of this Court in Adams v. Evatt, supra, which although not a formal precedent surely should have been at least addressed by the Second Circuit in its decision. Also, the Second Circuit's ruling conflicts with five other circuits regarding retroactive application of new cases involving the reasonable doubt standard.

2. Since the Gaudin and Ali cases concern substantive matters and decide the meaning of a statute, then the Teague restrictions on retroactivity do not apply.

The Second Circuit did not address the petitioner's claim that since the Gaudin and Ali cases changed the law, then such cases should be applied retroactively. The petitioner in his brief to the Second Circuit, pp. 18-19, stated that the Gaudin and Ali cases changed the law concerning the false statement statute and thus should be applied retroactively in collateral relief cases. The petitioner argued that the "basic theme" of his brief was that there was no difference in his case where the trial court used the preponderance of the evidence standard and the second scenario in Bilzerian v. United States, 127 F.2d 237(2nd Cir. 1997), where the court in a very similar situation held that the Gaudin and Ali cases should be applied retroactively in collateral relief cases.

In Bilzerian, the defendant was charged with both sections of the false statement statute and the court noted that at the time of the defendant's trial prior to Ali materiality was an issue under the first section of the false statement statute but was not an issue under the second section. Bilzerian, supra, 127 F.3d at 239, 241. In Ali, supra, 68 F.3d at 1474-1475, the Second Circuit held in response to Gaudin that materiality is as much an element of the second section as the first section of the false statement statute, 18 U.S.C., Sec. 1001. The court in Bilzerian, supra at 239, further noted that the trial court had followed the law at the time and ruled that the statements in question were material under the first section but the court made no finding on materiality on the second section nor submitted it to the jury.

Concerning the first section of the statute, the court in Bilzerian held that Gaudin and Ali were not retroactive because the issue of materiality was decided by the court and the new cases "merely shifts the determination of materiality from the judge to the jury ... [and t]here is little reason to believe that juries will have substantially different

interpretations of materiality than judges and therefore, practically speaking, Gaudin will do little to alter the status quo." Bilzerian, supra at 241. However, the issue concerning whether the trial judge had applied the preponderance of the evidence standard in making its determination was not addressed. See Mandanici II at 527, n.15, App. 15a-16a, n.15.

The present petitioner's situation is similar to the second part of Bilzerian where the court held that the Gaudin and Ali cases were retroactive in collateral relief cases regarding the second section of the statute where neither the jury nor the trial judge had decided materiality. Bilzerian, supra at 241-242. The court in Bilzerian stated that because

> "the rule announced in Ali [that materiality is an element of the second section of the statute in which the trial court made no determination] is **substantive rather than procedural, the analysis set forth in Teague v. Lane does not apply....** When **new substantive rules** are announced, there is a **presumption** that they will be applied **retroactively**.... Although we agree with Bilzerian that United States v. Ali is **retroactively applicable on collateral review**, we nevertheless affirm the dismissal of Bilzerian's section 2255 petition, because the error here is harmless .... [since] the evidence [was] overwhelming". Bilzerian, supra at 242(emphasis added).

Thus in situations where no decision on materiality had been made, then the Gaudin and Ali cases in effect become cases that redefine the false statement statute by holding that there is an element of materiality which must be proven beyond a reasonable doubt. The reason that the petitioner's situation is the same as the second scenario in Bilzerian where no decision on materiality had been made (and thus the Gaudin and Ali cases are retroactive) is that in the eyes of the

law a decision based on the civil preponderance of the evidence standard is the same as if there was no verdict.

The use of a standard of proof less than the reasonable doubt standard is the legal equivalent of "no ... verdict". Sullivan, supra, 508 U.S. at 280. The Second Circuit has ruled that a "guilty verdict rendered by a jury that applied a standard less demanding than 'proof beyond a reasonable doubt' is a **nullity**. Sullivan v. Louisiana, [supra]". Chalmers v. Mitchell, 73 F.3d 1262, 1267(2nd Cir. 1996)(emphasis added). When the reasonable doubt standard is not used, that is the equivalent of "no judicial determination", Nutter v. White, supra, 39 F.3d at 1158; and "prevents a ... verdict ... from coming into existence."Adams v. Aiken, supra, 41 F.3d at 178.

There is not much difference between the preponderance of the evidence standard and the probable cause standard for an arrest, and no conviction can stand if it is based merely on the standard for an arrest. The "more accurate notion of the preponderance of the evidence standard is evidence which as a whole shows that the fact sought to be proved is more probable than not." United States v. Montague, 40 F.3d 1251, 1255(D.C. Cir. 1994). The degree of proof to constitute probable cause for an arrest is merely that the police have a "belief that an offense has been committed". Smith v. Edwards, 175 F.3d 99, 106(2nd Cir 1999). Such a belief that a defendant has committed a crime is not much different than a factfinder's belief that there is a preponderance of the evidence that a defendant committed a crime. But since an arrest based on probable cause has no evidentiary significance regarding guilt, then neither should a belief by a factfinder that the defendant probably committed the crime. An "arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction [based on the reasonable doubt standard] ... may be inquired about to undermine the trustworthiness of a witness." Michelson v. United States, 335 U.S. 469, 482, 69 S. Ct. 213, 93 L. Ed. 168(1948). If a witness can't be impeached because of an

arrest based on probable cause, then a citizen should not be publicly impeached with a felony conviction based on the similar standard of a preponderance of the evidence.

Thus in the eyes of the law, there was no determination of materiality at the petitioner's trial. The Ali case and in effect the Gaudin case changed the meaning of the statute upon which the petitioner was convicted by requiring the government to prove materiality beyond a reasonable doubt.

Therefore, the Gaudin and Ali cases as they affect the petitioner changed the meaning of a criminal statute and thus qualify for retroactive application regardless of Teague. This Court after the Bilzerian case held that "because Teague by its terms applies only to procedural rules, we think it is **inapplicable** to the situation in which this Court **decides the meaning of a criminal statute**". Bousley v. United States, supra, 523 U.S. at 620(emphasis added).[7]

---

[7] When a new case concerns a substantive matter rather than procedure and thus Teague does not apply, then a defendant has to establish cause for not raising the issue earlier and prejudice. Bousley, supra at 621-623. The petitioner in his Brief to the Second Circuit, pp. 11, 19-26, argued that he had established cause and prejudice, and also argued that even if he had not established cause and prejudice then collateral relief was still warranted because he can establish the alternative of actual innocence. See Bousley at 623-624. The petitioner contended that the cause for not raising the issue earlier was that all the controlling authority including Supreme Court and Second Circuit decisions consistently ruled against the claim that prevailed in Gaudin. See Gaudin, supra, 515 U.S. at 519-521(holding that its decision repudiated its earlier case of Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268, 73 L. Ed. 692(1929)), Ali, supra, 68 F.3d at 1474-1475(stating that its decision holding that materiality is an element of the false statement statute overturned "settled law of this Circuit"). The petitioner also argued that to establish the alternative of actual innocence, he could rely on matters outside the original record. Bousley, supra at 623-624. Thus the petitioner could rely on the national HUD audit that revealed that waivers were commonplace and also rely on the HUD documents that revealed that not only did HUD refuse to accept the petitioner's offer after his convictions to rescind the contract but HUD was afraid that the petitioner might go to court to void the contract, all of which revealed that HUD wanted the contract and did not consider the statements on work completion to be material.

As the Second Circuit noted, this case involves "complex constitutional questions". Mandanici II at 527, n. 15, App. 16a, n.15. Although "this distinction between substance and procedure [regarding new cases] is an important one in the habeas context", Bousley, supra at 620, an absolute distinction is difficult to make regarding the Gaudin and Ali cases. The petitioner contends that the Gaudin and Ali cases meet the second exception for retroactivity set forth in Teague. But the Ali case and as a practical matter the Gaudin case also decided the "meaning of a criminal statute" and thus concerned substance as well as procedure. Such cases that involve substantive matters are retroactively applicable in collateral relief cases

Thus the Court should grant this petition because the Second Circuit has decided an important question of federal law that conflicts with the principles set forth by this Court in Bousley and conflicts with the Second Circuit's own precedent in Bilzerian. This case is as important as the Gaudin case and this Court should address the problem that it identified in Gaudin concerning the Circuits such as the Second Circuit where the issue of materiality had been decided by a standard less than the constitutionally required reasonable doubt standard. Gaudin, supra, 515 U.S. at 510, n.1.

Conclusion

This Court should not allow a criminal conviction to remain in effect which was based on a civil standard of proof. In this unique situation where the trial court stated that the case did not "call for criminal remedies... [because it concerns] a civil contract ... with civil ramifications", Record, #27, p. 1165, and where the Second Circuit ruled that a civil standard of proof was used, then surely coram nobis relief is warranted to "achieve justice". United States v. Morgan, supra. Since the constitutionally required reasonable doubt standard was never applied in this case on the issue of materiality, this

Court should grant this petition and ultimately remand the case to the lower courts for a hearing and an evaluation as to whether the evidence was sufficient to establish beyond a reasonable doubt that the statements were material.

The Petitioner John C. Mandanici, Jr.
By Richard Emanuel
Counsel Of Record
601 Plymouth Colony
Branford, Ct. 06405
(203) 488-1040

I. Appendix

Table of Contents

1. Ruling Of The United States Court Of Appeals For The Second Circuit, United States Of America, Respondent-Appellee, v. John C. Mandanici, Jr., Petitioner-Appellant, Docket No. 99-2059, Entered February 23, 2000.....2a

2. Ruling On Petition For Writ Of Coram Nobis, District of Connecticut, United States of America v. John C. Mandanici, Jr., Crim. No. 82-1103(AWT) filed December 4, 1998.....26a

3. Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing And Petition For Rehearing En Banc, United States of America, Respondent-Appellee, v. John C. Mandanici, Jr., Petitioner-Appellant, Docket No. 99-2059, Entered May 12, 2000.....32a

1. RULING OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1999
(Argued: September 22, 1999 Decided: FEB 23 2000
Docket No. 99-2059

UNITED STATES OF AMERICA,
Respondent-Appellee,
V.
JOHN C. MANDANICI, JR.,
Petitioner-Appellant.

Before: KEARSE, OAKES, and CABRANES, *Circuit Judges*

Appeal from a judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge),* entered December 4, 1998, denying petitioner appellant's petition for a writ of error *coram nobis.* On appeal, petitioner contends that his constitutional rights were violated at his 1983 trial for making false statements of fact in violation of 18 U.S.C., Sec. 1001 because the trial court made a finding of materiality based on a preponderance of the evidence rather than beyond a reasonable doubt, as required following the decisions in *United States v. Gaudin*, 515 U.S. 506(1995), and *United States v. Ali,* 68 F.3d 1468(2nd Cir. 1995).

Affirmed.

Judge Kearse concurs in the opinion and judgment of the Court, and files a concurring opinion.

BRIAN E. SPEARS, Assistant United States Attorney for the District of Connecticut (Stephen C. Robinson, United States Attorney for the District of Connecticut, *of counsel), for Respondent-Appellee.*

James J. RUANE, Bridgeport, CT, *for Petitioner-Appellant.*

Jose A. CABRANES, *Circuit Judge:*

The principal question presented, as a matter of first impression, is whether the change in the law of this Circuit following *United States v. Gaudin,* 515 U.S. 506 (1995), to require proof of materiality beyond a reasonable doubt for conviction under 18 U.S.C., Sec. 1001, applies retroactively on collateral review. Petitioner John C. Mandanici, Jr., appeals from a judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge),* entered December 4, 1998, denying his petition for a writ of error *coram nobis*.[1] Judge Thompson held that *Gaudin* does not apply retroactively insofar as the Supreme Court's decision changed the law to require that materiality be decided by a jury rather than the judge, but he did not address Mandanici's alternative argument concerning the standard of proof required for conviction after *Gaudin.* We hold that this latter change in law does not apply retroactively on collateral review, and therefore affirm the judgment of the District Court.

I.

The factual background of this case is described in detail in our opinion on direct appeal, *see United States v. Mandanici*, 729 F.2d 914 (2nd Cir. 1984), familiarity with which is assumed, and will be repeated here only to the extent necessary.

---

[1] A District Court may issue a writ of error *coram nobis* pursuant to the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C., Sec. 1651 (a). *See generally United States v. Morgan*, 346 U.S. 502 (1954).

Mandanici owned an apartment building in Bridgeport, Connecticut, in the early 1980s, for which he sought and received rent subsidy benefits under a program funded by the United States Department of Housing and Urban Development ("HUD"). *See id.* at 915. To participate in the program, Mandanici was required, *inter alia*, to complete and file a number of documents with the Bridgeport Housing Authority, which administered the program locally on behalf of HUD. *See id.* at 915-16. In 1982, Mandanici was indicted by a federal grand jury sitting in the District of Connecticut on three counts of making false statements in these documents, in violation of 18 U.S.C., Sec. 1001,[2] and on a fourth count of making false statements to a federally insured bank, in violation of 18 U.S.C., Sec. 1014.[3] *See Mandanici*, 729 F.2d at 916 & n.2.

---

[2] The version of Sec. 1001 in effect at the time of Mandanici's trial is quoted in the text below.

[3] At the time of Mandanici's trial, Sec. 1014 provided in relevant part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of ... [any one of several enumerated entities including] any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance, discount, purchase, purchase agreement, repurchase agreeement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therfor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C., Sec. 1014(1976). Congress amended this provision in 1989, 1990, 1994, and 1996. *See* 18 U.S.C.A. Sec. 1014 historical and statutory notes (West Supp. 1999). For the purposes of this case, these amendments are not material.

In February and March 1983, Mandanici was tried before a jury, with Judge Robert C. Zampano, presiding. When Mandanici was tried, Sec. 1001 provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C., Sec. 1001 (1976).[4] By its plain terms, the provision established three separate offenses: (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; (2) making a false, fictitious, or fraudulent statement; and (3) making or using a false writing or document.[5] A conviction under Sec. 1001 could be sustained if the jury found that the requirements of any one of these three offenses had been met.

At the time of Mandanici's trial, the law in this Circuit was that materiality was an element only of the first offense - namely, falsifying, concealing, or covering up by trick, scheme, or device a *material* fact. *See, eg., United States v.*

---

[4] Congress amended Sec. 1001 slightly in 1994, see Pub. L. No. 103-322, Sec. 330016(1)(L), 108 Stat. 2147, 2147 (1994), and enacted a wholesale revision in 1996, *see* Pub. L. No. 104-292, Sec. 2, 110 Stat. 3459, 3459 (1996). For the purposes of this case, these amendments are not material.

[5] Congress's 1996 amendment, *inter alia*, codified these offenses as separate subsections of Sec. 1001. *See* Pub. L. No. 104-292, Sec. 2, 110 Stat. 3459, 3459 (1996) (codified at 18 U.S.C., Sec. 1001).

Marchisio, 344 F.2d 653, 666 (2nd Cir. 1965). Materiality in such cases, however, was not an issue to be decided by a jury, but rather an issue to be decided by the judge as a matter of law. *See, eg., United States v. Gribben, 984* F.2d 47, 50-51 (2nd Cir. 1993). A conviction for making false statements or for making or using false writings, on the other hand, did not require any finding of materiality. *See United States v. Elkin,* 731 F.2d 1005, 1009 (2nd Cir. 1984); *see also United States v. Bilzerian,* 926 F.2d 1285, 1299 (2nd Cir. 1991).

Although Mandanici was charged with making false statements, it appears that Judge Zampano believed materiality was an element of the offenses charged, albeit one to be decided by him rather than by the jury.[6] Thus, at the close of Mandanici's trial, Judge Zampano did not instruct the jury that it had to find beyond a reasonable doubt that Mandanici's statements were material; instead, Judge Zampano himself made a finding of materiality.[7]

---

[6] Other issues concerning materiality surfaced at trial. At the time of Mandanici's trial, there was a circuit split with respect to whether materiality was an element of making false statements to a federally insured bank in violation of Sec. 1014, *compare, eg., United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981) (holding that materiality is an element under Sec. 1014), *with United States v. Cleary*, 565 F.2d 43, 46 (2nd Cir. 1977) (holding that it is not), but it was *not* a required element within this Circuit, *see Cleary*, 565 F.2d at 46. Nevertheless, the parties at Mandanici's trial and Judge Zampano apparently believed that materiality was an element under Sec. 1014, and Judge Zampano charged the jury to that effect with respect to count four. In 1997, the Supreme Court resolved the circuit split on this issue, holding that materiality is not an element under Sec. 1014. *See United States v. Wells*, 519 U.S. 482, 484 (1997).

[7] Judge Zampano did not explicitly make a finding of materiality on the record. However, the parties agree that he made such a finding. Moreover, during the charging conference, Mandanici's trial counsel objected to an instruction proposed by the Government in which Judge Zampano would have charged the jury that he had found the statements material. Specifically, Mandanici's counsel stated in relevant part:

Judge Zampano submitted the case to the jury on March 4, 1983. On the same day, the jury returned a verdict of guilty on all three counts of making false statements in violation of Sec. 1001, and not guilty with respect to the charge under Sec. 1014. On direct appeal, we reversed Mandanici's conviction on one of the three Sec. 1001 counts for insufficiency of the evidence, but affirmed his convictions on the other two, finding that the evidence "amply support[ed]" the charges. *Mandanici*, 729 F.2d at 920; *see id,* at 921. Mandanici served a three-year term of probation and paid a $20,000 fine.

In June 1995, the Supreme Court ruled that if materiality is an element under Sec. 1001, a finding of materiality must be made by the jury, rather than by the judge. *See United States v. Gaudin,* 515 U.S. 506, 522-23 (1995). The Supreme Court refrained from expressly deciding whether materiality is an element under Sec. 1001,[8] but in *United States v. Ali,* 68 F.3d 1468 (2nd Cir. 1995), *amended on denial*

> I would object to your Honor instructing the jury that you have found the statements to be material. I understand that the law that's in the court, the power to submit or not submit a statement to the jury depending upon whether you determine it to be material or not.... [But notifying the jury that you have made such a determination] may add emphasis where none may be intended by the court, and none should be given.

From this statement, and the surrounding colloquy, it can be inferred that Judge Zampano made a finding of materiality as a matter of law.

Although the parties agree that Judge Zampano decided the question of materiality, they disagree about the standard of proof that he used in doing so. We discuss this issue in further detail below. *See infra* Section II.B.1.

[8] The Government in *Gaudin* had conceded that materiality was an element under Sec. 1001. *See* 515 U.S. at 509. Accordingly, the Supreme Court did not consider the issue. *See id.* at 524 (Rehnquist, C.J., concurring).

of reh'g, 86 F.3d 275 (2nd Cir. 1996), decided four months after *Gaudin*, we overruled our precedents and held that materiality is an element of any and all charges under Sec. 1001. *See id.* at 1474-75. Accordingly, the law in this Circuit now requires that for a conviction under Sec. 1001 to be sustained, the jury must have made a finding of materiality beyond a reasonable doubt.

On November 17, 1995, invoking *Gaudin*, Mandanici filed a petition for a writ of error *coram nobis* to vacate and expunge his convictions.[9] Mandanici alleged that his "[c]onstitutional rights to due process and to a jury trial were

---

[9] This petition is not Mandanici's first attack on his convictions. After his convictions were affirmed on direct appeal, Mandanici filed a motion in April 1984 seeking, *inter alia*, a new trial on the ground that he was prejudiced by nondisclosure of certain documents. Following a four-day hearing, Judge Zampano denied Mandanici's motion, and we affirmed. *See United States v. Mandanici*, Crim. No. 82-1103 (D. Conn. Jan. 18, 1985) (rulings on motion for a new trial, motion to dismiss, and motion for fingerprinting), *aff'd*, 770 F.2d 158 (2nd Cir. 1985) (table), *cert. denied*, 474 U.S. 1082 (1986). In December 1988, Mandanici filed a petition for a writ of error *coram nobis* alleging selective prosecution and nondisclosure of certain documents. Judge Zampano denied the petition, and we affirmed by unpublished order. *See United States v. Mandanici*, Crim. No. 82-1103 (D. Conn. Mar. 8, 1989) (ruling on defendant's petition for writ of *corarn nobis)*, *aff'd*, No. 89-2142 (2nd Cir. Sept. 1, 1989) (unpublished order). Finally, in July 1990, Mandanici filed another petition for a writ of error *coram nobis*, alleging, *inter alia*, selective prosecution, nondisclosure of certain documents, and that he lacked the requisite criminal intent. Once again, Judge Zampano denied the petition and we affirmed by unpublished order. *See United States v. Mandanici*, Crim. No. 82-1103 (D. Conn. Nov. 5, 1990) (endorsement order), *aff'd*, No. 90-1666 (2nd Cir. Apr. 24, 1991) (unpublished order). Thus, the present petition constitutes Mandanici's third petition for a writ of error coram nobis.

We note that Mandanici filed his present petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Sec. 735, 110 Stat. 1214. Accordingly, we need not - and do not - decide whether AEDPA's provisions apply to *coram nobis* petitions. *Cf. United States v. Perez*, 129 F.3d 255, 260 (2nd. Cr. 1997) (holding that AEDPA's provision requiring a certificate of appealability for an appeal does not apply to Sec. 2255 petitions filed before the statute's effective date).

violated by the trial court's failure to instruct the jury that the government had the burden of proving beyond a reasonable doubt the element of materiality." In an opinion filed December 4, 1998, Judge Thompson denied the petition, relying on our decision in *Bilzerian v. United States*, 127 F.3d 237 (2nd Cir. 1997), to hold that *Gaudin* does not apply retroactively on collateral review. This timely appeal followed.

II

A writ of error *coram nobis* is "essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction." *Fleming v. United States*, 146 F.3d 88, 89-90 (2nd Cir. 1998) (per curiam). *Coram nobis* is "not a substitute for appeal, and relief under the writ is strictly limited to those cases in which errors of the most fundamental character have rendered the proceeding itself irregular and invalid." *Foont v. United States*, 93 F.3d 76, 78 (2nd Cir. 1996) (internal quotation marks and ellipsis omitted); *see Nicks v. United States*, 955 F.2d 161, 167 (2nd Cir. 1992) (stating that a writ of error *coram nobis* should be granted "only where extraordinary circumstances are present"). In reviewing a petition for the writ, a court must presume that the proceedings were correct, and the burden of showing otherwise rests on the petitioner. *See Nicks*, 955 F.2d at 167.

To obtain *coram nobis* relief, a petitioner "must demonstrate that '1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ.'" *Fleming*, 146 F.3d at 90 (quoting *Foont*, 93 F.3d at 79). On appeal, we review *de novo* the question of whether a district judge applied the proper legal standard, but review the judge's ultimate decision to deny the writ for abuse of discretion. *See Fleming*, 146 F.3d at 90.

A.

As noted, Judge Thompson denied Mandanici's present petition on the ground that *Gaudin* does not apply retroactively on collateral review. In *Gaudin*, the Supreme Court held that if materiality is an element under Sec. 1001, the Fifth and Sixth Amendments require that a jury, not a judge, make the finding. *See* 515 U.S. at 522-23. Following *Gaudin*, we held in *Ali* that materiality is an element of any and all charges under Sec. 1001. *See* 68 F.3d at 1474-75. Thus, while before *Gaudin* and *Ali* materiality in a prosecution under Sec. 1001 could have been decided by the judge, or not at all (if materiality was not an element), now the issue is reserved for the jury in all cases.

In *Bilzerian*, we confronted the question of whether *Gaudin* and/or *Ali* applies retroactively on collateral review. Bilzerian had been convicted in 1989 of, *inter alia*, both concealing material facts *and* making false statements. *See* 127 F.3d at 239. In accordance with the law at the time (which was unchanged from 1983, when Mandanici was tried), the trial judge made findings of materiality with respect to the charges of concealing material facts; in contrast, the judge neither made findings nor instructed the jury concerning materiality with respect to the charges of making false statements. *See id.*[10]

In view of these facts, we engaged in a bifurcated analysis. First, with respect to Bilzerian's conviction for

---

[10] In *Bilzerian*, we mistakenly attributed subsections to the version of Sec. 1001 that was in effect at the time of Bilzerian's trial. *See* 127 F.3d at 239. Nevertheless, it is apparent from the opinion-and from the post-1996 version of Sec. 1001 - that we there referred to the offense of concealing material facts and the offense of making false statements as Sec. 1001(a)(1) and Sec. 1001(a)(2), respectively.

concealing material facts, we held that *Gaudin* does not apply retroactively on collateral review. Applying the framework announced by the Supreme Court in *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion), we decided as a threshold matter that the rule in *Gaudin* was a "new" rule of constitutional criminal procedure. *See Bilzerian*, 127 F.3d at 240-41. Under *Teague*, new rules of constitutional criminal procedure do not apply retroactively on collateral review unless they fall into either of two categories: (1) new rules that "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense"; or (2) "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (internal quotation marks and citation omitted). We resolved that the *Gaudin* rule does not fall into either of these categories, and therefore held that it does not apply retroactively on collateral review. *See Bilzerian*, 127 F.3d at 241. The rule in *Gaudin*, we reasoned, "merely shifts the determination of materiality from the judge to the jury ... [and t]here is little reason to believe that juries will have substantially different interpretations of materiality than judges." Id.

In contrast, we concluded that the holding of *Ali*, that materiality is an element of the offense of making false statements in violation of Sec. 1001, does apply retroactively. *See Bilzerian*, 127 F.3d at 242. The rule announced in *Ali*, we explained, was substantive, rather than procedural. While a new rule of constitutional criminal procedure generally does not apply retroactively on collateral review, a new rule of substantive criminal law is presumptively retroactive because a defendant may have been "punished for conduct that simply is not illegal." *Id.*, *see Ingber v. Enzor*, 841 F.2d 450, 453-54 (2nd Cir. 1988). We determined that the rule in *Ali* presented such a case; that is, *Ali* redefined Sec. 1001 "to legalize certain

conduct previously thought to be criminal." *Bilzerian*, 127 F.3d at 242. Accordingly, we held that the rule of *Ali* - that materiality is an element of the offense of making false statements in violation of Sec. 1001 - applies retroactively on collateral review. *See id.*[11]

B.

In Mandanici's case, materiality was *not* an element of the false statements offenses with which he was charged, and which survived intact following direct appeal. Thus, at first glance, his case would appear to be an *Ali*-type case. Nevertheless, as Mandanici concedes, Judge Zampano made a finding of materiality as a matter of law. Accordingly, in ruling on the present petition, Judge Thompson treated Mandanici's case as a *Gaudin*-type case and held, following *Bilzerian*, that the new procedural rule does not apply retroactively on collateral review.

On appeal, Mandanici challenges Judge Thompson's conclusion on the ground that Judge Zampano erred not only in failing to submit the question of materiality to the jury, but also in the standard of proof he used to decide the question as a matter of law. Specifically, Mandanici argues that (1) in accordance with Second Circuit law at the time, the issue of materiality was decided at his trial under a preponderance-of-the-evidence standard; (2) after *Gaudin* and *Ali*, materiality must be proved beyond a reasonable doubt; and (3) notwithstanding *Bilzerian*, this change in the law should be applied retroactively under *Teague*. We agree with the first two steps of this argument, but disagree with the third.

---

[11] Despite this holding, we denied Bilzerian's petition for habeas relief on the ground that the failure to include materiality as an element was harmless. *See* 127 F.3d at 242.

1.

First, we are persuaded that Judge Zampano decided the issue of materiality at Mandanici's trial under the preponderance standard. The trial transcript itself does not make clear what standard Judge Zampano used.[12] However,

---

[12] During the charging conference, Mandanici's trial counsel analogized Judge Zampano's finding of materiality to the finding of conspiracy by a preponderance of the evidence that a judge must make before admitting statements by a co-conspirator. *See United States v. Cicale*, 691 F.2d 95, 103 (2nd Cir. 1982) (stating that proof of a conspiracy for purposes of admitting co-conspirator statements need only be by a preponderance of the evidence); *see also Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). The record is otherwise silent with respect to the standard of proof Judge Zampano used.

Nevertheless, the Government would have us infer from Judge Zampano's jury instructions that he and/or the jury decided the issue of materiality using the reasonable doubt standard. With respect to each of the three counts charging violations of Sec. 1001, Judge Zampano charged the jury in relevant part:

> [T]here are three essential elements which the government must prove beyond a reasonable doubt .... The three essential elements are, first, that on the date in question and with respect to the document in question, the Defendant made or caused to be made a false, fictitious and fraudulent statement or representation .... Second, that he did such act or acts with knowledge that the writing or documents were false, fictitious and fraudulent *in some material part.* Third, that he did such act knowingly and willfully and with an intent to deceive.

We are unwilling to make the inference urged by the Government, however for two reasons. First, Judge Zampano made only brief reference to materiality-in the context of describing the element requiring proof of knowledge-and, unlike the other components of each element, he did not thereafter define the term. (In contrast, Judge Zampano explicitly defined the term 'material' with respect to count four - which charged bank fraud in violation of Sec. 1014 - apparently believing, albeit mistakenly, *see supra* note 6, that materiality was an element of that offense to be decided by the jury.) Second, at the time of Mandanici's trial, pattern jury instructions with respect to Sec. 1001 and like provisions often included

to the extent that materiality was treated as an element of an offense when Mandanici was tried, the law within this Circuit was that the judge decided the question as a matter of law under the preponderance standard. *See, e.g., Gribben,* 984 F.2d at 50-51 (stating that "[t]he government bears ... the burden of proving materiality [under both 18 U.S.C. Sec. 1623(a) and the first clause of Sec. 1001], but *its burden need not be 'beyond a reasonable doubt'; the burden is satisfied by a preponderance of the evidence"* (emphasis added)); *United States v. Cunningham,* 723 F.2d 217, 226 (2nd Cir. 1983) ("Materiality [under Sec. 1623] is ordinarily to be determined by the court by a preponderance of the evidence. ").[13] Under these circumstances, we assume that Judge Zampano made his finding of materiality at Mandanici's trial using the

---

references to materiality, even when the issue was one for the court rather than the jury. *See, eg., Waldemer v. United States,* 106 F.3d 729, 734 (7th Cir. 1997) (per curiam) (quoting the jury instructions with respect to the offense of making false statements before a grand jury, in violation of 18 U.S.C. Sec. 1623(a), from 2 SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS 106-07 (West 1984)); *Wickersham v. United States,* 976 F. Supp. 551, 553 & n.2 (E.D. Tex. 1996) (quoting a jury instruction with respect to the offense of making false statements on an income tax return, in violation of 26 U.S.C., Sec. 7206(l)).

[13] The Government contends that our statement in *Gribben* applied only to charges of perjury under Sec. 1623(a), and not to charges under Sec. 1001, but we disagree. In dismissing the charges against Gribben and his codefendant in the first instance, the District Court had stated that the government bears the burden of proving materiality *both* under the first clause of Sec. 1001 *and* under Sec. 1623(a) by a preponderance of the evidence. *See United States v. Gribben,* 792 F. Supp. 960, 963 (S.D.N.Y. 1992), *rev'd,* 984 F.2d 47 (2nd Cir. 1993). And, in reversing, we reinstated the charges against Gribben *both* under Sec. 1623 and under Sec. 1001. See *Gribben,* 984 F.2d at 52.

Moreover, this conclusion accords with the Supreme Court's understanding of our precedent. In *Gaudin,* the Supreme Court cited our decision in *Gribben* for the proposition that some courts permit materiality under Sec. 1001 to be found by a mere preponderance of the evidence. See 515 U.S. at 510 n.1.

preponderance standard. *Cf. Bilzerian*, 127 F.3d at 240 ("A court in the Second Circuit, deciding the issue at the time of Blizerian's trial, would certainly have felt compelled to follow the existing precedent in its circuit.").

2.

Because it is plain that, after *Gaudin* and *Ali*, a finding of materiality under Sec. 1001 must be made using the reasonable doubt standard,[14] the next question is whether this change in the law applies retroactively on collateral review.[15]

---

[14] Strictly speaking, *Gaudin* itself did not change the rule regarding the standard of proof on materiality. *See Gaudin*, 515 U.S. at 510 n. 1 ("The 'beyond a reasonable doubt' point is not directly at issue in the present case, since it is unclear what standard of proof the District Court applied in making its determination of materiality . . . ."). Instead, the change was a logical consequence of our subsequent holding in *Ali* that materiality is an element of any and all charges under Sec. 1001. *See* 68 F.3d at 1474-75.

[15] Several courts have held, as we did in *Bilzerian*, that *Gaudin* does not apply retroactively with respect to the issue of whether the judge or jury determines materiality. *See United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997); *United States v. Swindall*, 107 F.3d 831 (11th Cir. 1997); *Wickersham v. United States*, 976 F. Supp. 551 (E.D. Tex. 1996); *United States v. Nazon*, 936 F. Supp. 563 (N.D. Ind. 1996); *United States v. Holland*, 919 F. Supp. 431 (N.D. Ga. 1996); *see also United States v. Dale*, 140 F.3d 1054, 1057-60 (D.C. Cir. 1998) (Henderson, J., concurring). *But cf. Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997) (per curiam) (applying *Gaudin* retroactively in a Sec. 2255 proceeding without discussing *Teague*). In contrast, whether *Gaudin* applies retroactively with respect to the standard of proof appears to be a question of first impression. *But cf.* Swindall, 107 F.3d at 836 (stating that if the appellant had "assert[ed] that the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material," his argument "would [have] implicate[d] the accuracy of the materiality finding," thereby perhaps triggering the second exception to the *Teague* rule); *Nazon*, 936 F. Supp. at 570 & n.2 (similar).

Although we did not explicitly address this issue in *Bilzerian*, it is arguable that we did so implicitly. That is, because Bilzerian's trial judge

Although we have never actually addressed the question of whether *Teague* applies to petitions for a writ of error *coram nobis*, we have stated that, "[b]ecause of the similarities between coram. nobis proceedings and Sec. 2255 proceedings, the Sec. 2255 procedure often is applied by analogy in coram nobis cases." *Fleming*, 146 F.3d at 90 n.2 (internal quotation marks omitted). Accordingly, we now hold that *Teague* applies to *coram nobis* petitions. *See United States v. Swindall*, 107 F.3d 831, 833-34 & n.4 (11th Cir. 1997) (applying *Teague* to a *coram nobis* petition); *United States v. Nazon*, 936 F. Supp. 563, 568-69 (N.D. Ind. 1996) (same).

Under *Teague*, "new rules" of constitutional criminal procedure or novel applications of old rules "are generally not applied retroactively on [collateral] review." *Bilzerian*, 127 F.3d at 240; *see Stringer v. Black*, 503 U.S. 222, 227-29 (1992) (extending *Teague* to novel applications of old rules). A "new rule" is a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301 (plurality opinion). Put differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Under these standards, the requirement that materiality under Sec. 1001 be proved beyond a reasonable doubt is a new rule-or at least a novel application of an old rule. As we discussed above, prior to *Gaudin* and *Ali*, the law of this Circuit was that to the extent materiality was an element under Sec. 1001, it posed a question of law for the trial judge to decide under a preponderance-of-the-evidence

---

presumably made his finding of materiality under the first clause of Sec. 1001 by a preponderance of the evidence, our holding that *Gaudin* does not apply retroactively with respect to that offense could be read as an implicit rejection of Mandanici's argument. Nevertheless, we decline to read into our *Bilzerian* opinion something that simply is not in it, particularly when doing so would entail resolution of complex constitutional questions.

standard. *See Gribben*, 984 F.2d at 50-51; *see also Gaudin*, 515 U.S. at 510 n. 1 (noting that "some courts," including this Court and the Sixth Circuit, "do not require the higher burden of proof"). Thus, it cannot be said that a court considering Mandanici's claim at the time his conviction became final "would have felt compelled by existing precedent to conclude" that the Constitution required proof of materiality beyond a reasonable doubt. *Gray v. Netherland*, 518 U.S. 152, 166 (1996) (internal quotation marks omitted); see *also Butler v. McKellar*, 494 U.S. 407, 412 (1990) ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'").

3.

Because the requirement that materiality be proved beyond a reasonable doubt for conviction under § 1001 is a new rule, it does not apply retroactively on collateral review unless it fits within one of the two *Teague* exceptions. Mandanici wisely concedes the inapplicability of the first *Teague* exception-for new rules that "place an entire category of primary conduct beyond the reach of the criminal law" or that "prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer*, 497 U.S. at 241. Instead, he argues that the change in the law to require proof of materiality beyond a reasonable doubt fits within the second *Teague* exception. Although this question is a close one, we hold that the second *Teague* exception is also inapplicable.

The second *Teague* exception extends to new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (internal quotation marks omitted). Although the Supreme Court has acknowledged that "the precise contours of this exception may be difficult to discern," *Saffle v. Parks*, 494

U.S. 484, 495 (1990), it has emphasized, through words and example, that the exception is exceedingly narrow, applying "only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty," *Graham v. Collins*, 506 U.S. 461, 478 (1993) (internal quotation marks omitted) (ellipsis in original). To fit within the second exception, it is not enough that a new rule "is aimed at improving the accuracy of trial," *Sawyer*, 497 U.S. at 242, or even that it promotes "[t]he objectives of fairness and accuracy," *Saffle*, 494 U.S. at 495. The new rule must also be a "watershed rule[]" that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 241-42 (internal quotation marks and emphasis omitted). In short, it must be a "groundbreaking occurrence," *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994), a "sweeping" change that applies to a large swathe of cases rather than a "narrow right" that applies only to a "limited class" of cases, *O'Dell*, 521 U.S. at 167.

The Supreme Court has underscored the narrowness of the second *Teague* exception by invoking the "sweeping rule" of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of the type of rule that fits within the exception, *O'Dell*, 521 U.S. at 167; *see Saffle*, 494 U.S. at 495 (stating that a rule must have "the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception" to qualify under the second *Teague* exception); *see also Gray*, 518 U.S. at 170, and by repeatedly noting that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion); *accord Graham*, 506 U.S. at 478; *Sawyer*, 497 U.S. at 243; *Butler*, 494 U.S. at 416. The Supreme Court has further underscored the narrowness of the second Teague exception by its example. Beginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria

for the second exception and, in every case, has refused to apply the rule at issue retroactively. *See O'Dell*, 521 U.S. at 167 (rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a capital defendant must be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he is a future danger); *Lambrix v. Singletary*, 520 U.S. 518, 539-40 (1997) (rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992), that in certain states where a sentencing judge is required to give deference to a jury's advisory sentencing recommendation with respect to the death penalty, neither the jury nor the judge is permitted to consider invalid aggravating circumstances); *Gray*, 518 U.S. at 170 (rule that the state's failure to give adequate notice of some of the evidence it intended to use in the petitioner's capital sentence proceeding violates due process); *Goeke v. Branch*, 514 U.S. 115, 120-21 (1995) (per curiam) (rule that due process generally prohibits a state appellate court from dismissing the appeal of a recaptured fugitive); *Caspari*, 510 U.S. at 396 (rule that twice subjecting a defendant to a noncapital sentence enhancement proceeding violates the Double Jeopardy Clause); *Gilmore v. Taylor*, 508 U.S. 333, 345-46 (1993) (rule announced in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), that the failure to instruct a jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state violates due process); *Graham*, 506 U.S. at 478 (proposed rule that jury instructions preventing a petitioner's sentencing jury from considering mitigating evidence in capital sentencing proceeding violate the petitioner's Eighth and Fourteenth Amendment rights); *Sawyer*, 497 U.S. at 241-45 (rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment prohibits the imposition of a death sentence by a jury that has been led to the false belief that responsibility for determining the appropriateness of the capital sentence lies elsewhere); *Saffle*, 494 U.S. at 495 (proposed rule that the trial court's instruction in the petitioner's capital sentence proceeding, telling the jury to

"avoid any influence of sympathy," violates the Eighth Amendment); *Butler*, 494 U.S. at 416 (rule announced in *Arizona v. Roberson*, 486 U.S. 675 (1988), that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation); *Teague*, 489 U.S. at 314-15 (plurality opinion) (rule announced in *Taylor v. Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment's fair cross-section requirement applies to a petit jury).

With these principles and examples in mind, we conclude that the rule requiring proof of materiality beyond a reasonable doubt for conviction under Sec. 1001 does not fit within the second *Teague* exception. To be sure, we agree with Mandanici that such a rule promotes both accuracy and fairness. *See, eg., In re Winship*, 397 U.S. 358, 363 (1970) (holding that the reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (internal quotation marks omitted)); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (referring to the reasonable doubt requirement as "a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function" (alteration in original)); *cf. Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (holding that the rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), that certain jury instructions on the beyond-a reasonable-doubt standard violate due process, fits within the second *Teague* exception because "[t]he reasonable doubt standard guards against conviction of the innocent by ensuring the *systematic* accuracy of the criminal system" and an improper reasonable doubt charge "undermines the fundamental fairness of *every* trial in which it is used"). Moreover, we acknowledge that some cases, including at least

one in this Circuit, can be read to hold that promoting fairness and accuracy is, by itself, sufficient to qualify for the second *Teague* exception. *See Sanders v. Sullivan*, 900 F.2d 601, 606-07 (2d Cir. 1990) (holding that a rule prohibiting conviction based on the use of perjured testimony at trial even though the prosecution has no knowledge of its falsity qualifies for the second *Teague* exception); *see also Ostrosky v. Alaska*, 913 F.2d 590, 594-95 (9th Cir. 1990) (holding that a rule that a defendant has a due process right "to rely as a matter of law on a lower court decision in his own case that a statute is unconstitutional even though the case is on appeal to a higher court" fits within the second *Teague* exception). However, the Supreme Court has emphasized, most recently in *O'Dell*, that to qualify for the second *Teague* exception, a rule must also be a "watershed" rule. *See O'Dell*, 521 U.S. at 167; *see also Lyons v. Stovall*, 188 F.3d 327, 341-42 (6th Cir. 1999); *Spaziano v. Singletary*, 36 F.3d 1028, 1042-43 (11th Cir. 1994); *Cain v. Redman*, 947 F.2d 817, 822 (6th Cir. 1991). Indeed, in 1990, in *Sawyer v. Smith*, the Supreme Court explicitly rejected an argument made by the petitioner that "the second *Teague* exception should be read to include new rules ... that preserve ... accuracy and fairness," 497 U.S. at 242 (internal quotation marks omitted), admonishing that such a test

> looks only to half of our definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist*, but later abandoned in *Mackey (v. United States*, 401 U.S. 667 (1971)), under which new rules that "significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist v. United States*, 394 U.S. 244, 262(1969). In *Teague*, we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to *watershed rules of fundamental*

> *fairness*. It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. *Teague*, *489* U.S. at 311 (quoting *Mackey*, 401 U.S. at 693).

497 U.S. at 242.

In short, unlike the "sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases," *O'Dell*, 521 U.S. at 167, the requirement that materiality be proved beyond a reasonable doubt for conviction under Sec. 1001 is a "narrow right" that affects only "a limited class" of cases, *id.* - indeed, as we discussed above, it affects only a subset of Sec. 1001 cases, in the subset of circuits, like ours, that prior to *Gaudin* had allowed proof of materiality by a mere preponderance of the evidence. Thus, "[w]hatever one may think of the importance of [this] rule" - and we think it is of great importance - "it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle*, 494 U.S. at 495. Accordingly, the rule that materiality must be proved beyond a reasonable doubt for conviction under Sec. 1001 does not apply retroactively on collateral review, and Mandanici cannot challenge his 1983 conviction on the basis of any such error.

III.

To summarize, we hold as follows:

(1) With respect to the offenses of making false statements in violation of 18 U.S.C., Sec. 1001 of which Mandanici was convicted in 1983, and which survived intact

following direct appeal, the *trial judge* made a finding of materiality using the preponderance-of-the-evidence standard, consistent (to the extent relevant here) with the law of this Circuit at the time of the trial.

(2) Following *United States v. Gaudin*, 515 U.S. 506 (1995), and *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), the law in this Circuit requires that for a conviction under Sec. 1001 to be sustained, the *jury* must have made a finding of materiality beyond a reasonable doubt.

(3) The framework established by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), applies to petitions for a writ of error *coram nobis*.

(4) Under *Teague*, the change in the law of this Circuit to require a finding of materiality beyond a reasonable doubt in any and all prosecutions under Sec. 1001 is a new rule of constitutional criminal procedure or a novel application of an old rule - and therefore does not apply retroactively unless it falls within one of the two exceptions fashioned by the Supreme Court.

(5) This change concededly does not fit within the first *Teague* exception, for new rules that "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (citation omitted).

(6) Nor does this change fit within the second *Teague* exception, for "new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer*, 497 U.S. at 241-42.

(7) Thus, the rule that materiality must be proved beyond a reasonable doubt for conviction under Sec. 1001 does not apply retroactively on collateral review, and Mandanici cannot challenge his 1983 conviction on the ground of any such error.

Accordingly, the judgment of the District Court is affirmed.

KEARSE, Circuit Judge, concurring:

I concur in the majority opinion and the judgment. I write separately to state my view that even absent *Teague* considerations, *coram nobis* relief would be inappropriate in this case.

An important difference between habeas relief and *coram nobis* lies in the fact that, because the latter comes after the petitioner has completed his sentence, the petitioner will not be retried; thus, the granting of *coram nobis* normally results in the expungement of the conviction, with no possibility of further proceedings to determine whether the petitioner was guilty of the offense charged. Accordingly, it has long been held that in order to obtain *coram nobis* relief a petitioner must show an error that "compel[s] . . . action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511(1954), *see, e.g., Fleming v. United States*, 146 F.3d 88, 90 (2nd Cir. 1998); *Foont v. United States*, 93 F.3d 76, 79 (2nd Cir. 1996); *Nicks v. United States*, 955 F.2d 161, 167(2nd Cir. 1992).

In the present case, the error is that an element of the offense was found established by a preponderance of the evidence, rather than beyond a reasonable doubt. A preponderance means more likely than not. The element was the materiality of false statements made by petitioner

Mandanici in connection with obtaining payment for services on a federally funded construction contract. There is no contention in this petition that the evidence was not sufficient to establish materiality by a preponderance. (And the reason may be found in our opinion affirming on the two counts of conviction at issue here. *See United States v. Mandanici*, 729 F.2d 914, 920 (2nd Cir. 1984) (noting that the record showed not only that Mandanici had represented that the construction project was completed though it was not, but also that he had "submitted false documentation of his purported expenditures with respect to nearly every task detailed in" the contract's work specification); *id.* at 921 (noting that there was "ample proof" to permit a jury to find "that Mandanici had no intention of ever completing the agreed-upon work").)

Nor is there any suggestion here that a standard below that of preponderance was used. Thus, the consequences of granting a writ of *coram nobis* in this case would be to expunge, without possibility of reinstatement, the conviction of a person who more likely than not committed the offenses of which he stands convicted. In my view, the granting of *coram nobis* in such a circumstance could not properly be characterized as necessary to "achieve justice."

2. RULING OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

---------- X

United States of America

Filed December 4, 1998

v.

Crim. No. 82-1103(AWT)

John C. Mandanici, Jr.

---------- X

RULING ON PETITION FOR WRIT OF CORAM NOBIS

The petitioner, John C. Mandanici, Jr. has petitioned the court, pursuant to common law and the All Writs Statute, 28 U.S.C., Sec. 1651, *see United States v. Morgan*, 346 U.S. 502 (1954), to issue a writ of coram nobis to vacate and expunge his convictions for violations of 18 U.S.C., Sec. 1001 and to order that the amount he paid in fines be returned to him. For the reasons stated below, the defendant's petition is being denied.

I. BACKGROUND

On March 4, 1983, petitioner Mandanici was convicted, after a jury trial, on three counts of giving false statements to the Department of Housing and Urban Development in violation of 18 U.S.C., Sec. 1001. The jury acquitted Mandanici on a fourth count that charged a violation of 18 U.S.C., Sec. 1014. On appeal, the Second Circuit affirmed Mandanici's conviction on counts two and three, and reversed the conviction on count one due to insufficient

evidence. *See United States v. Mandanici*, 729 F.2d 914 (2nd Cir. 1984). Mandanici served a three year term of probation and paid a $20,000 fine.

When Mandanici was tried, the law in the Second Circuit was that the determination as to whether a fact is material under Sec. 1001 was one to be made by the judge, rather than the jury. Accordingly, at Mandanici's trial, the court did not instruct the jury that it had to find that the government had proven beyond a reasonable doubt that the defendant's statements as alleged in counts two and three were actually material. Subsequently, in *United States v. Gaudin*, 515 U.S. 506 (1995), the Court held that whether a fact is material under Sec. 1001 is exclusively a question for the jury.

In light of this new rule of constitutional criminal procedure announced in *Gaudin*, Mandanici petitions the court to grant him collateral relief by means of a writ of coram nobis.

II. DISCUSSION

Like a petition under 28 U.S.C., Sec. 2255, coram nobis is a form of collateral relief. The standards applied to a coram nobis petition are similar to those governing proceedings under 28 U.S.C., Sec. 2255; it is available, however, "with respect to a federal felony conviction when the sentence has been fully served." *See United States v. Travers*, 514 F.2d 1171, 1172-3, (2nd Cir. 1974). The writ of coram nobis is available when a claimed error of law constitutes "a fundamental defect which inherently results in a complete miscarriage of justice" and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *See Edwards v. United States*, 564 F.2d 652, 654 (2nd Cir. 1977)(quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

Petitioner Mandanici contends that his convictions for violating 18 U.S.C., Sec. 1001 must be set aside because the Supreme Court in *United States v. Gaudin*, 515 U.S. 506 (1995), unequivocally ruled that the question of whether a fact is material under Sec. 1001 is one for the jury, and that a failure by the trial court to instruct the jury that it must find the false statements to be material violates a defendant's right under the Fifth and Sixth Amendments to have a jury make a finding on each element of the offense. *See Gaudin*, 515 U.S. at 522-24. Prior to *Gaudin*, and at the time of Mandanici's trial, the governing law in this circuit was that the determination of materiality was to be made, as a matter of law, by the trial judge. *See United States v. Elkin*, 731 F.2d 1005, 1009 (2nd Cir. 1984). Mandanici argues that because the jury at his trial did not render a verdict on the element of materiality as to the Sec. 1001 counts, his conviction on those counts must be vacated.

The government does not dispute that Mandanici's jury failed to make a finding of materiality on the Sec. 1001 counts as now required by *Gaudin*. Rather, the government contends that Mandanici is not entitled to relief because the change in law represented by *Gaudin* is not to be applied retroactively on collateral review. The court agrees.

The recent decision in *Bilzerian v. United States*, 127 F.3d 237, 240 (2nd Cir. 1997) makes it clear that *Gaudin* is not to be applied retroactively on collateral review. In *Bilzerian*, a federal inmate, who had been convicted on several counts of making false statements to the Securities and Exchange Commission in violation of 18 U.S.C., Sec. 1001, petitioned for a writ of habeas corpus pursuant to 28 U.S.C., Sec. 2255. He argued, among other things, that his conviction should be reversed in light of *Gaudin* because the jury at his trial had not been instructed to decide the element of materiality in the Sec. 1001 counts.

The court of appeals noted that it "must first determine, as a threshold matter, whether the Gaudin rule applies retroactively on collateral review." *Id.* at 240. In making that determination, the court applied *Teague v. Lane*, 489 U.S. 288 (1989), which states the rule governing retroactivity for cases on collateral review, as follows:

> Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

Teague, 489 U.S. at 310. The court noted that:

> Teague recognizes two exceptions to the general rule that new rules of constitutional procedure are not retroactive on collateral review: (1) new rules which "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense;" and (2) "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding."

Bilzerian, 127 F.3d at 241. (citation omitted).

After finding that the holding in *Gaudin* was, indeed, a "new rule" of constitutional criminal procedure, and that it did not fall within either of the *Teague* exceptions, the court in *Bilzerian* concluded that *Gaudin* is not to be applied retroactively to cases on collateral review.

In *Teague*, Justice O'Connor, writing for the majority, took note of the fact that "[t]he past cannot always be erased by a new judicial declaration." *Teague*, 489 U.S. at 308

(quotation omitted). She then went on to explain why this is so:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U.Chi.L.Rev. 142, 150 (1970). "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 450-451 (1963) (emphasis omitted). See also *Mackey*, 401 U.S., at 691, 91 S. Ct., at 1179 (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").

Id. at 309.

The instant case is for all practical purposes indistinguishable from *Bilzerian*. Thus, the court concludes that the petitioner here is not entitled to collateral relief with respect to his convictions under 18 U.S.C., Sec. 1001 based on Gaudin, and this result is fair and just for the reasons discussed by the court in *Teague*. The court's determination on this

threshold issue makes it unnecessary to address any of Mandanici's other arguments.

III. CONCLUSION

For the foregoing reasons, Mandanici's petition for a writ of coram nobis is hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut on this 4th day of December 1998.

Alvin W. Thompson
United States District Judge

3. RULING OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of May two thousand

---

USA

v Dkt No: 99-2059 Filed May 12, 2000

Mandanici

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John C. Mandanici,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By:_____
Beth J. Meador,
Administrative Attorney

po ccc
inbancdn_frm

Submitted By

Richard Emanuel
Counsel Of Record For The Petitioner John C. Mandanici, Jr.
601 Plymouth Colony
Branford, Ct. 06405
(203) 488-1040